

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>90-10928</u>
BARRY WENDALL STEWART)	
)	
Debtor)	
_____)	
)	
BARRY WENDALL STEWART)	FILED
)	at 3 O'clock & 04 min. P.M.
Plaintiff)	Date: 6-30-93
)	
vs.)	Adversary Proceeding
)	Number <u>93-01015A</u>
FIRST UNION MORTGAGE CORPORATION)	
)	
Defendant)	

ORDER

Defendant, First Union Mortgage Corporation (First Union), contends this court lacks subject matter jurisdiction over plaintiff's complaint. The following facts are undisputed and relevant to the jurisdictional objection.

On February 11, 1987 the debtor filed a Chapter 13 petition in this court. Debtor successfully completed that Chapter 13 case and received a discharge on May 7, 1990. One month later, on June 7, 1990, debtor filed the underlying Chapter 13 case. In the underlying case, First Union filed a proof of secured claim in the amount of Fifty-Four Thousand Three Hundred Eighty-Nine and

86/100 (\$54,389.86) Dollars and a payment arrearage claim of Three Thousand Nine Hundred Eighty-Eight and 29/100 (\$3,988.29) Dollars. Debtor proposed a Chapter 13 plan which provided that postpetition installment payments pursuant to the terms of his contract with First Union would be made direct to First Union, and any arrearage claim would be paid by distributions from the Chapter 13 trustee. Debtor's plan was confirmed by order dated October 19, 1990.

Postconfirmation, First Union sought relief from the automatic stay, 11 U.S.C. §362(a), alleging debtor failed to meet his contractual obligations. By order dated January 27, 1992 First Union's motion for relief from stay was denied conditioned on the debtor's maintenance of contractual payments and curing his then existing postpetition delinquency on the First Union obligation. Specifically, the order established debtor's delinquency at Three Thousand Eight Hundred Forty-Three and 07/100 (\$3,843.07) Dollars and required First Union to apply two checks from debtor payable to First Union in the amounts of Five Hundred Twenty-Seven and No/100 (\$527.00) Dollars and Five Hundred Twenty-Seven and 78/100 (\$527.78) Dollars to the delinquency, reducing its balance to Two Thousand Seven Hundred Eighty-Eight and 29/100 (\$2,788.29) Dollars. The order required debtor to cure the delinquency by making monthly payments equal to one-half of the contractual installments, in addition to the regular monthly payment.

On October 5, 1992 First Union filed a "Motion to Allow

Amended Proof of Claim Filed Past the Bar Date" (the motion to amend). In the motion to amend, First Union alleged the prepetition arrearage shown in its original proof of claim was incorrectly calculated on the basis of 7 payments instead of 9 payments and that the correct amount is Six Thousand Six Hundred Fifty-Four and 53/100 (\$6,654.53) Dollars.

On December 15, 1992, while the motion to amend was pending, First Union filed another motion for relief from stay, contending debtor failed to comply with the conditions of the order dated January 27, 1992 denying its previous motion for relief from stay. By order dated January 5, 1993 I granted First Union relief from the stay to foreclose its security interest. The January 5 order provided that the

[s]ection 362(a) stay regarding any and all creditor action is lifted by this court as to [First Union] . . . regarding the real property and premises of the Debtor described in the Deed to Secure Debt attached to Movant's Motion as Exhibit "A" and incorporated herein by reference. Further ORDERED that [First Union] . . . be allowed to proceed as the holder of the Deed to Secure Debt designated in this case, to assert its rights, including, but not limited to the institution of foreclosure proceedings . . . and to assert any or all of its respective rights under Georgia law.

On January 19, 1993, having obtained relief from the stay, First Union withdrew its motion to amend.

Debtor filed this adversary proceeding on February 16, 1993. In his complaint debtor states that he has completed all plan

payments in the underlying case and awaits the trustee's final report.¹ Debtor alleges that postpetition First Union has demanded payment of arrearage which accrued either prepetition or during the term of the Chapter 13 plan. Debtor maintains that all such arrearage will be included in his Chapter 13 discharge under 11 U.S.C. §1328(a).² Debtor further alleges that First Union is bound pursuant to 11 U.S.C. §1327(a) to the terms and conditions of his confirmed Chapter 13 plan. Debtor also maintains that First Union is prohibited by 11 U.S.C. §506(b) from recovering any "post petition charges" by diverting plan principal and interest payments to such charges because, according to debtor, First Union has not sought in the underlying case to recover any §506(b) fees or costs. The complaint specifically requests a declaratory judgment "that the additional monies and other payments [First Union] claims [debtor] owes pursuant to the contract which occurred prior to or during the execution of [debtor's] plan are null and void, and an order to enjoin [First Union] from further collection activities against [debtor] based upon any debt that is dischargeable or discharged under the Bankruptcy Code." Complaint, para. No. 1. Finally, debtor alleges that "[b]y attempting to collect payments directly from [debtor] that were provided for in [debtor's] Chapter 13 plan,

¹The Chapter 13 trustee filed the final report on February 17, 1993.

²On February 23, 1993 debtor received a discharge in the underlying case.

[First Union] has violated the automatic stay provisions of the Bankruptcy Code." Complaint, para. No. 21. The debtor seeks damages pursuant to 11 U.S.C. §362(h) for the alleged stay violation. Debtor states in the complaint that this court's jurisdiction is based on 28 U.S.C. §1471.

The parties were given an opportunity to brief the court on the jurisdictional issue. First Union argues that the effect of debtor's complaint is to untimely seek reconsideration of the order dated January 5, 1993 granting First Union relief from the stay. First Union also maintains that this court lacks jurisdiction by virtue of 11 U.S.C. §1322(c), which sets a five year cap on the length of a Chapter 13 plan. According to First Union, the debtor has been in Chapter 13 "in excess of the allowed 5 years" because he has been "in Chapter 13 under two sequential case numbers since 1987." Letter brief dated April 29, 1993 p. 2. In his brief, debtor elaborates on his allegations in the complaint, but does not specifically address the jurisdictional issue.

First Union's jurisdictional arguments are incorrect. To the extent debtor's complaint seeks reconsideration by this court of this court's order granting First Union relief from the stay, clearly this court has jurisdiction over the matter. As to 11 U.S.C. §1322(c),³ it does not limit the total number of years that

³11 U.S.C. §1322(c) provides that "the plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may

a debtor may spend in separate Chapter 13 cases; rather, it limits the length of "the plan" in each Chapter 13 case filed. Section 1322(c) does not bear on the bankruptcy court's jurisdiction over an adversary proceeding filed in a pending Chapter 13 case.

The statute cited by debtor in the complaint as the basis for jurisdiction, 28 U.S.C. §1471, has been superseded by 28 U.S.C. §1334, which Congress enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub L. 98-353, 98 Stat. 333, following the Supreme Court's holding in Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) that 28 U.S.C. §1471 was an unconstitutional grant of power to bankruptcy courts. Under 28 U.S.C. §1334⁴ there are four categories of proceedings which the district courts (and their bankruptcy units, see 28 U.S.C. §§151, 157(a)) have jurisdiction to hear: (1) all cases under title 11; (2) all civil proceedings arising under title 11; (3) all civil proceedings

not approve a period that is longer than five years." (Emphasis added).

⁴28 U.S.C. §1334 provides in pertinent part:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11 [U.S.C.].

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

arising in cases under title 11; and (4) all civil proceedings related to cases under title 11. 28 U.S.C. §1334(a), (b). A cause of action must fall within one of these four categories of proceedings to sustain the bankruptcy court's jurisdiction. Matter of Wood, 825 F.2d 90, 92 (5th Cir. 1987).

The first category, over which the district court has original and exclusive jurisdiction, see 28 U.S.C. §1334(a), relates to the original bankruptcy petition itself. Wood, supra, at 92. See also In re: American Energy, Inc., 50 B.R. 175, 178 (Bankr. D. N.D. 1985). The second and third categories establish jurisdiction in "core" proceedings under 28 U.S.C. §157(b)(2). Wood, supra, at 96-97. The phrase "arising under title 11" describes proceedings "that involve a cause of action created or determined by a statutory provision of title 11." Id. at 96. Such proceedings concern "administration of the estate . . . in the sense that no adverse third party is involved (e.g., a dispute between the debtor and the trustee regarding a claim to exemptions)." Austin v. Tatum, et al. (In re: Donald E. Austin), Ch. 11 case No. 85-40639 Adv. No. 89-4020, slip op. at 5 (Bankr. S.D. Ga. Dalis, J. Dec. 31, 1989) (quotation mark omitted). "Arising in" proceedings are those "that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy." Wood, supra, at 97. See also Austin, supra, at 5-6. The overriding test as to whether a proceeding is a "core proceeding" as "arising

under" or "arising in" a title 11 case is whether "it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." Wood, supra, at 97. For a case to be "related to" a bankruptcy case, there must be some nexus between the civil proceeding for which jurisdiction is sought and the bankruptcy proceeding. American Energy, supra, at 179.

The debtor's request for a declaratory judgment "aris[es] under" title 11, a core proceeding, insofar as resolution of issues raised thereby requires determinations of how and to what extent 11 U.S.C. §§506(b), 1327(a), and 1328(a), statutory provisions of title 11 cited by debtor in the complaint, apply to or affect First Union's arrearage claim - issues which could only arise in the context of a bankruptcy case. Resolution of these issues could be in the form of a declaratory judgment. 28 U.S.C. §2201(a). Moreover, this court has the power to "issue any order . . . necessary or appropriate to carry out the provisions of . . . title [11]," 11 U.S.C. §105(a), including an injunction barring First Union from attempting to collect a debt discharged pursuant to 11 U.S.C. 1328(a). As to the debtor's allegation that First Union violated the automatic stay, this is likewise a core proceeding as it invokes provisions of title 11, 11 U.S.C. §362(a) and (h), and could only arise in the context of a bankruptcy case. This court is, therefore, vested with jurisdiction over debtor's complaint

under 28 U.S.C. §§157 and 1334.

Nevertheless, debtor's complaint on its face warrants dismissal. The complaint requests a declaratory judgment, an injunction, and damages for an alleged stay violation. Debtor's request for a declaratory judgment involves issues pertaining to First Union's claim and the extent to which First Union may enforce its contractual rights against him. These issues have already been litigated and resolved in the underlying case. The January 27, 1992 order in the underlying case established the amount of debtor's delinquency under the contract and the terms for satisfying it. When debtor failed to meet those terms, I granted First Union relief from the automatic stay to foreclose its security interest and "to assert any or all of its respective rights under Georgia law," including the right to collect all amounts owed it under the contract. The issues raised by debtor's request for a declaratory judgment having been previously litigated between these parties and resolved by this court, and debtor having received a full and fair opportunity to litigate these issues, res judicata bars relitigation. See I.A. Durbin, Inc. v. Jefferson Nat. Bank, 793 F.2d 1541, 1549 (11th Cir. 1986). An action barred by the doctrine of res judicata may be dismissed sua sponte. U.S. v. Sioux Nation of Indians, 448 U.S. 371, 100 S.Ct. 2716, 2749, 65 L.Ed.2d 844 (1980); Cf. Iacaponi v. New Amsterdam Casualty Co., 379 F.2d 311 (3d Cir. 1967), cert. denied, 389 U.S. 1054, 88 S.Ct. 802, 19 L.Ed. 2d 849

(1968). Furthermore, since res judicata bars debtor's request for a declaratory judgment, debtor's request for an injunction is moot. Concerning debtor's allegation that First Union violated the automatic stay by attempting "to collect payments directly from [debtor] that were provided for in [debtor's] Chapter 13 plan," the order dated January 27, 1992 granting First Union relief from stay is not so limited. Rather, it permits First Union to assert all of its rights under State law, which allows First Union to fully enforce the provisions of its contract with debtor. Because the stay, having been lifted, was not in effect when First Union allegedly attempted to collect payment on its claim from debtor, the stay violation allegation fails to state a claim upon which relief can be granted. Federal Rule of Civil Procedure 12(b)(6) (made applicable by Federal Rule of Bankruptcy Procedure 7012(b)). Pursuant to Federal rule of Civil Procedure 12(b)(6), the court may sua sponte dismiss a complaint for failure to state a claim. Smith v. Boyd, 945 F.2d 1041, 1042-43 (8th Cir. 1991).

First Union's answer contains a counterclaim for sanctions pursuant to Federal Rule of Bankruptcy Procedure 9011. In its brief, First Union requests this court to determine whether this court has jurisdiction to impose sanctions under Rule 9011. This court may impose sanctions pursuant to Rule 9011. Although debtor's complaint lacks merit, I do not find it frivolous. Sanctions are not warranted.

It is therefore ORDERED that the complaint is dismissed;
further ORDERED that the counterclaim for sanctions is
dismissed.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 30th day of June, 1993.